February 16, 2007

Richard M. Brennan, Senior Regulatory Officer
Wage and Hour Division, Employment Standards Administration
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: ESA Docket ID 2006-0022--Request for Information on the Family and Medical Leave Act of 1993

Dear Mr. Brennan:

Hewitt Associates welcomes the opportunity to offer comments on the December 1, 2006 Request for Information (RFI) on regulations implementing the FMLA. We have responded to several questions posed by the Department of Labor (“Department”) and, where possible, suggested regulatory revisions that might better serve employers and their employees. In particular, we have focused our comments on administrative challenges.

With more than 65 years of experience, Hewitt Associates (NYSE: HEW) is the world’s foremost provider of human resources outsourcing and consulting services. The company consults with more than 2,300 organizations and administers human resources, health care, payroll and retirement programs on behalf of more than 340 companies to millions of employees and retirees worldwide. Located in 35 countries, Hewitt employs approximately 24,000 associates. We lead the HR Business Process Outsourcing industry with the greatest market share,¹ and specific to leaves of absence, we provide services to nearly 30 clients, representing 750,000 employees. All told, Hewitt administers 10,000 active leaves at any one time and processes 50,000 requests per year. For more information, please visit www.hewitt.com.

We hope that this experience can lend a distinct and constructive viewpoint regarding the administration of the FMLA. According to Hewitt’s own 2004 survey on leaves of absence, The Nuts and Bolts of Leaves of Absence 2004 (“Hewitt 2004 Survey”), a mere 24% of organizations think they do a good job of administering leaves. Coupled with the fact that many, if not most, employers offered similar leaves of absence even before the FMLA was enacted, this suggests that the real issue for employers is not what they need to do (e.g., providing 12 weeks of leave), but how they should do it. We encourage the Department to take the ideas cultivated from this process and use them to revise the current regulations and provide fairer, clearer, and more reliable guidance.

¹ TPI, October 2006, based on contracts covering 10,000 employees or more, by number of clients
Finally, with regard to these comments, we kept in mind two guiding principles. First, we have not focused on challenges that derive from the law itself, as opposed to the regulations. We recognize that such issues are beyond the scope of this regulatory review and any changes that the Department could make. Second, we have measured our comments against the stated purposes of the FMLA as enumerated in the law, specifically, “to entitle employees to take reasonable leave” for qualifying reasons while also “accommodat[ing] the legitimate interests of employers.”

The topics and sub-topics addressed are:

- The Definition of Serious Health Condition
- Clarifications of the Health Care Provider Certification Form
- The Notice and Certification of Leaves
  - The Ragsdale aftermath and the employer’s duty to notify employees of their FMLA rights
  - The “two day timeframe” for the employer’s designation of the leave and the ability of the employer to revoke mis-designations
  - The treatment of telecommuters
- Employer Management of FMLA Leaves
  - “Clarification and Authenticity”
  - Recertifications
  - Revoking the designation of uncertified leaves
- Interaction of the FMLA and state FMLA laws

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2 For example, although it is an important issue, we have not addressed increasing the minimum amount of time used for intermittent leaves to a half day. Although such a change would create easier administration, the law says that the employer cannot reduce an employee’s entitlement balance “beyond the amount of leave actually taken.” 29 U.S.C. § 2612(b)(1). Therefore, such a change is beyond the scope of the Department’s responsibilities.

The comments within each of those sections include: (1) the relevant questions from the RFI, (2) a discussion on each subject matter, and (3) constructive suggestions on how the regulations might be revised.

**Definition of “Serious Health Condition”**

“Is there a way to maintain the substantive standards of section 825.114(a) [providing categorical definitions of a “serious health condition”] while still giving meaning to section 825.114(c) and congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA?” Section B

**Discussion—The “List” and “Category” Definitions of Serious Health Condition Conflict**

The Department has asked how the “substantive standards” for determining a serious health condition (e.g., inpatient care, absence plus treatment, chronic conditions) should be reconciled with the proscriptions that “minor illnesses like colds, earaches, etc., [are] not covered by the FMLA.” For example, according to § 825.114(c), an “earache” is not a serious health condition. And yet, if an earache resulted in “absence plus treatment,” as defined in § 825.114(a), it would be a qualifying condition. In short, the list of non-serious health conditions (e.g., earaches) often conflicts with the qualifying categories (e.g., “absence plus treatment,”) resulting in confusion, uncertainty, and potential risk for employers.

One suggestion would be to eliminate the list altogether. This would ostensibly make the process easier for employers and employees, and would alleviate at least some of the confusion and ambiguity that the Department has acknowledged exists today. The list, however, echoes Congressional intent on excluding outright certain “non-serious health conditions” even if it is too difficult to use with sufficient certainty (e.g., the earache example, or headaches vs. migraines). Nonetheless, it is our experience that the list serves a purpose—it offers a baseline from which to analyze whether an illness or injury meets the definition of a serious health condition. We suggest that the problem is not that the list exists, but that the list exists for use by the employer. Rather, health care providers are in a far better position to evaluate an employee’s condition and determine its severity, treatment regimen, etc.

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4 See, e.g., Caldwell v. Holland of Texas, 208 F.3d 671 (8th Cir. 2000) (earache that became a “serious earache” requiring surgery to prevent deafness was a serious health condition under the FMLA).

5 § 825.114(a)(2).
Suggestions—Add the Non-Serious Health Condition List to the Certification of Health Care Provider Form

Hewitt suggests that the Department add the non-serious health condition list in § 825.114(c) to the sample Certification of Health Care Provider Form (WH-380). This would equip health care providers with an illustrative framework that outlines which conditions qualify and, more importantly, which do not qualify under the law. With the information offered in both § 825.114(a) and § 825.114(c), a health care provider can consider all of the relevant regulations and apply them to the employee’s particular circumstances. We believe that this approach will result in more reliable certifications and decrease the need (but not eliminate the option) for employers to clarify information submitted on the form or obtain second and third opinions.

Clarification of the Certification of Health Care Provider Form

“Does the model certification form (WH-380) seek the appropriate medical information? If not, what improvements could be made to the form to make it clearer and easier for health care providers to complete, so that it is more likely that the necessary and appropriate information will be reported?” Section K

Discussion—The Model Certification Form Creates Administrative Challenges for Employers and Employees

It is Hewitt’s experience through our FMLA administration for large employers, that on the first attempt, three out of four employees return the optional certification form (WH-380) either with errors or missing information. Furthermore, this number does not include subsequent unsuccessful attempts by the employee to complete the form. Returned forms are commonly incomplete or ambiguous because of:

- Missing employee signatures;
- Completing the wrong parts of the form (e.g., indicating a need for continuous instead of intermittent leave or leave for a family member’s serious health condition instead of the employee’s own serious health condition);
- Health care provider uncertainty regarding where to provide what information (e.g., nature of the condition, treatment regimen, or leave begin and end dates) or which questions are and aren’t required; or
- Missing pages.
Employers are uncertain as to what comprises a “complete” form, or how many times they must permit an employee to correct the form before denying the leave or feeling compelled to accept it as incomplete. Case law reinforces this dilemma. Following the lead of many other employers, Hewitt reformatted the certification form with positive results. Specifically, we:

- Eliminated duplicative or similar questions;
- Reduced the form to a single page;
- Used language to make the form easier to understand and complete;
- Created a form that is configurable to the employee’s articulated need for leave (e.g., if the leave is for the employee’s own serious health condition, the form doesn’t offer a box that would be checked for a leave due to the serious health condition of the employee’s child, spouse, or parent);
- Attached a checklist for the employee; and
- Used more directive questions, including, where possible, multiple choice and checkboxes for answer sections as opposed to freeform text (e.g., for intermittent leaves, boxes for the health care provider to fill in the frequency and duration of the leave).

Employers who used the revised form found that only one in four employees submitted forms that were incomplete or had errors, reflecting a 50% error rate reduction. Moreover, the primary deficiency on returned forms is a missing signature, which is easily corrected and without a doctor’s visit.

Suggestions—Revise the Certification Form (WH-380)

Hewitt believes that employees and employers would benefit from a revised, simplified, streamlined optional form WH-380. Revising the WH-380 would create more efficient and economical processes for employers and offer employees quicker

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7 Using the instructions set forth in §825.306.

8 For example, question 5(a) generally asks for the duration of the condition and the duration of the present incapacity. Question 5(c) asks the same questions but only for pregnancy disabilities and chronic conditions.
resolutions and less hassle. Hewitt suggests that the Department adopt some of the strategies we have listed (as well as including the “list” of serious health conditions as discussed above) and solicit the employer community for examples of revised certification forms.

**Notice and Certification of FMLA Leaves**

“What changes could be made to the regulations in order to comply with Ragsdale and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?” Section J.

**Discussion – Post-Ragsdale, the Employer’s Duty to Notify is Undefined**

As written, § 825.700(a) (the “penalty provision”) prohibits employers from reducing the 12-week entitlements of employees who were not properly notified of the leave’s designation. In other words, under the regulation, an employee would be able to take a job-protected leave in excess of the 12-week entitlement solely because an employer failed to inform him or her that the leave was designated as FMLA. The U.S. Supreme Court, in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S.Ct. 1155 (2002), struck down that provision.

Despite *Ragsdale*’s invalidation of the “penalty provision,” the Court left untouched the related regulation requiring employers to notify employees of their leaves’ FMLA designation, § 825.208(a), within two days of receiving notice of the need for leave (the “notice provision”). This left an open issue as to whether employers are truly required to “promptly and appropriately designate leave as FMLA leave” pursuant to § 825.208(a) when there are no penalties for failing to do so.

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9 Id. at 1165.
Most courts have followed *Ragsdale*’s interpretation of Congressional intent—that courts must make a “fact-specific inquiry into what steps the employee would have taken had the employer given the required notice.”\(^{10}\) And, where the employee can show that “actual harm” resulted from the employer’s failure to notify, the employer has been held liable.\(^{11}\) For example, the Third Circuit Court of Appeals held that an employee who required hospitalization and who was not notified of his FMLA rights by his employer “could have explored the feasibility of postponing the surgery to a subsequent FMLA period.”\(^{12}\)

**Suggestions—Clarify The Employer’s Notice Obligation**

In accordance with the *Ragsdale* decision, the Department is obliged to address the penalty provision of § 825.700(a). Such a change is unnecessary. The purpose of § 825.700(a) was to ensure employers provided employees notice of their FMLA rights. But even after the *Ragsdale* decision, employers have continued to recognize strong incentives in notifying their employees promptly of the leave. Our experience shows most employers strive to communicate clear information and set accurate expectations regarding the leave. Conversely, we’re not aware of employers that have flouted the notice requirement. Indeed, the concern of employers we’ve seen is how to provide *more* notice, not less. That’s because by providing this notice, employers:

- Educate employee about rights, responsibilities, and benefits during FMLA-qualifying leave
- Maximize likelihood that employee will promptly return to work
- Maintain or enhance engagement
- Minimize impact on other HR administrative processes
- Minimize impact on business operations

\(^{10}\) *Ragsdale*, 122 S.Ct. at 1162. See *Stansberry v. Ulrich Children’s Home*, 264 F. Supp. 2d 681, 689 (N.D. Ill. 2003); *Sims v. Schultz*, 305 F. Supp. 2d 838 (N.D. Ill. 2004). But see, e.g., *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, No. 00-2389, 2002 U.S. App. LEXIS 8853 (3rd Cir. Apr. 19, 2002) (employer’s failure to designate the leave was irrelevant); *Felder v. Winn-Dixie La.*, No. Civ.A.03-1438, 2003 US Dist. LEXIS 22535 at *15 (E.D. La. Dec. 16, 2003) (finding in favor of the employer because the employee “[could not] possibly have suffered any harm because of the lack of notice that would entitle her to reinstatement, damages or back pay when she had already taken more than 12 weeks of leave.”)


\(^{12}\) *Conoshenti*, 364 F.3d at 145, n.8
• Reduce available time off balances accurately.

This does not leave employees without remedies. Again, according to the Supreme Court’s decision, if an employee can show “actual harm” she is still entitled to all statutory remedies provided by the law, e.g., back pay, reinstatement, liquidated damages, etc. Thus, by deleting the “penalty” provision and simply reinforcing employer notification obligations, the conflict should be resolved.

“Does the two-day timeframe for providing notification to employees that their FMLA leave request has been approved or denied provide adequate time for employers to review sufficiently the information and make a determination?”

Section K.

Discussion—The “Two-Day Timeframe” and “Deeming” Provisions Create A Substantial Burden On Employers

In our experience, most employers, even those with sophisticated human resources information systems (HRIS) and strong records management practices, struggle to complete the steps required to approve or deny a request for FMLA leave within the “two-day timeframe.” The Supreme Court has appreciated this burden noting that “employers must decide, almost as soon as leave is requested, whether to designate the absence as FMLA leave. The answer might not always be obvious and this decision may require substantial investigation.”

Specifically, employers must determine:

• Whether they are covered by FMLA at the employee’s location or worksite (i.e., the “50 employee rule” set forth in § 825.104).

• Whether the employee has been employed for 12 months by the company, which is often complicated by missing employer records or bad data from predecessor companies.

• Whether an employee has worked 1,250 hours in the 12 months immediately preceding the leave which includes “actual” hours worked. This determination is made more difficult if recordkeeping practices are poor or where employers do not track hours worked for exempt employees.

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13 Ragsdale, at 122 S.Ct. at 1165.
• The amount of FMLA leave entitlement remaining (subtracting all FMLA time taken in the last 12 months including intermittent periods and in some situations, adding time that has “rolled” off the 12-month period).

Given these demands, it may be unreasonable to expect employers, within two business days of the request, to designate eligibility and entitlement accurately every time. Whether or not the Department considers revising the two-day timeframe, there is the additional issue of what recourse employers have if a mistake is made.

According to § 825.110(d), once employers designate the leave as FMLA they “may not subsequently challenge the employee’s eligibility.” In the rush to make these quick and complex calculations, employers may occasionally inform ineligible employees that they have FMLA protection. According to § 825.110(d), (commonly referred to as the “deeming” provision) this would confer a right to as many as 12 weeks of additional job protected leave upon such employees. As the Department noted, in Section I(C) of the RFI, however, most courts addressing this issue have found § 825.110(d) to be invalid. Therefore, ineligible employees who are mistakenly “deemed” to be FMLA eligible are not able to invoke FMLA rights.

Several courts, however, have allowed employees to pursue (or entertained the possibility of) claims under an equitable estoppel theory (where the employer is prohibited from contradicting its past eligibility designation because the employee relied on the representation to his or her detriment). In fact, in cases where the mistaken “deeming” occurred after the leave ended, courts allowed the entire leave to be protected due to the estoppel principle.

The Department itself embraced this position in an August 6, 2002 opinion letter where it concluded that an ineligible employee’s reliance solely upon the “deeming”
provisions of § 825.110(d) was “inappropriate.”¹⁷ The Department also left open the possibility that an employee could argue equitable estoppel.

But while equitable estoppel provides some guidance in the absence of § 825.110(d), it still does not provide a rule. In fact, an employer that wishes to “undeem” a leave is now required to make a subjective review of the employee’s circumstances (if the employer knows them) and analyze whether it would be fair to revoke the designation. If it is, the employer then must decide at what point the designation should end (e.g., upon notice, a week after giving the employee notice). Even then, an employer must hope that, if it’s sued, a court would agree that its resolution was fair. In sum, revoking § 825.110(d) allows employers to correct their errors by redesignating these leaves but, considering the analysis required, at an overly burdensome administrative price. The Department should craft a bright-line rule that balances the right of employers to revoke an “inappropriate” FMLA designation, with fairness to employees who have relied upon that designation.

Suggestions—Create an Instructive Process to Replace § 825.110(d)

We request that the Department revise and clarify § 825.110(d) to set forth a fair and instructive process that enables employers to correct designation errors, properly classify mis-designated leaves, and address whether an employee would be entitled to 12 weeks of job-protected leave once actually eligible for or entitled to FMLA.

However the Department chooses to approach it, these are some relevant considerations:

- Allow the employer to count the leave against the employee’s FMLA balance. Especially in situations where the employee is allowed to remain on leave even after the employer’s mis-designation notification, the employer should be able to consider that time as FMLA. This would conform with the Supreme Court’s central holding in *Ragsdale* that the FMLA provides, and only provides a total of 12 weeks of leave in a 12-month period.¹⁸

- Provide a “grace period” to employees who are required to return to work. Where the employer requires the mis-designated employee to return to work early, it would likely be estopped from denying job protection for that period, but may be able to consider any further absences as subject to its attendance policy. Before holding this time against the employee, however, it is likely the employee would be

¹⁸ *Ragsdale* 122 S.Ct. at 1163-64.
given a “grace period” to return to work. Creating a rule regarding the length of a grace period would necessarily contemplate the time remaining during the leave and the employee’s circumstances (e.g., reason for the leave, travel, accommodations made, etc).

• Condition the employer’s decision—allowing the leave to continue or requiring the employee’s return—on an immediate and thorough notification to the employee. The employer would need to explain, in writing, that the employee was either not entitled to and/or not eligible for FMLA job-protected leave. The written communication should also provide explicit instructions as to how the employee’s absences will be treated, an explanation of any grace period, the date at which the employee should return to work, any consequences of failing to return to work, and whether the job-protected time off will reduce the employee’s subsequent FMLA balance.

“Section 825.111 sets forth the standards for determining employer coverage under the statutory requirement that employers must employ 50 employees within 75 miles to be covered by the FMLA (29 U.S.C. § 2611(2)(B)(ii)) . . . . The Department seeks comment on these situations and any issues that may arise . . . when the employee works from home.” Section A.

Discussion—“When the employee works from home”
The Department asked for comment on issues that may arise when an employee works from home. The context is that employers are only eligible under the FMLA where 50 employees work within a 75 mile radius of the worksite. Where employees work at one “worksite” or a campus of “worksites” the regulations are clear enough. However, the regulations don’t specifically speak to employees who do not work at a traditional worksite. The “virtual workforce”—a population of employees that has increased significantly since the regulations were introduced—includes employees who work from home, on the road, at more than one worksite, or some combination of these. The provision most applicable to these virtual employees is § 825.111(a)(2), which concerns employees “with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots) . . . .” For these employees, the regulations instruct that “the ‘worksite’ is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.” Yet, it is not clear that this is the proper standard for telecommuters.
Suggestions—Provide Specific Instruction Regarding Telecommuters

§ 825.111(a)(2) should be broadened to include “virtual” employees or telecommuters. However, the challenging part will be clarifying the regulation to provide more instructive guidance. The current regulation defines a worksite as, “the site to which [employees] are assigned as their home base, from which their work is assigned, or to which they report.” The answers to those examples could all be different. For instance, an employee could be assigned to the Charlotte office, receive assignments from a project she’s assigned to in Houston, and report to a manager in New York. Employers will want clear direction on how to select the correct site, but at the same time, want the flexibility to select the method that best aligns to their current structure, systems, technologies, etc. In addition, the regulation will need to ensure that virtual workers have the same access to FMLA rights and benefits as employees working at a covered worksite.

Employer Management of FMLA Leaves
Questions Addressed

• “Does scheduled FMLA leave present different problems or benefits from unscheduled FMLA leave? Does intermittent leave present different problems or benefits from leave taken for one continuous block of time? Does the length of leave taken present different problems or benefits?” Section F.

• “Is there a way to appropriately balance employer absence control policies and legitimate employee use of unscheduled, intermittent leave?” Section F.

• “Does the regulatory provision (section 825.307) that permits an employer to contact the employee’s health care provider for purposes of clarification and authentication only through the employer’s health care provider result in unnecessary expenses for employers (e.g., by requiring them to hire a health care professional for purposes of this contact) and/or delay the certification process? What are the costs and benefits to having this limitation?” Section K.

• “Section 825.308 generally permits an employer to request a medical recertification no more often than every 30 days and only in connection with the absence of the employee. Is that an appropriate timeframe?” Section K.

• “Section 825.308(e) permits employers to request a second opinion only for the initial certification. What are the costs and benefits to greater flexibility in requesting second opinions for recertifications? Would it create any hardships?” Section K.
General Discussion of Leave Management
The Department has asked several questions that collectively address the difficulties employers have in managing FMLA leaves. According to a recent survey by the Society for Human Resource Management (SHRM), many types of leaves are relatively easy for employers to administer. For example, 71% of respondents said that they have not “experienced challenges” administering a leave for a birth or adoption in the past year.19

At the same time, employers almost universally express significant concerns regarding intermittent absences. The extent of the problem seems to vary by employer. In Hewitt’s experience, between 8% and 39% of the total number of leaves are intermittent. Moreover, employers report that they spend a disproportionate amount of time managing intermittent leaves, as these absences create more significant tracking and administrative burdens. The staffing reallocations that follow, particularly those that are unscheduled or unplanned leaves, are especially challenging. Employers also often suspect that employees are using these intermittent absences as end-runs around attendance policies. For example, a chronically tardy employee who is facing discipline or termination may produce a certification for intermittent leave due to serious health conditions like stress complications or migraines to avoid disciplinary actions. Once initiated these leaves are difficult to stop. An employer that wishes to challenge the employee’s certification may:

• Have its own health care provider contact the employee’s health care provider for purposes of clarification and authenticity
• Challenge the certification through a second opinion (by a health care provider of its own choosing) and then, should that opinion differ from the first, a tie-breaking third opinion (by a mutually-agreed upon health care provider) or
• Request that the employee recertify the leave.

These mechanisms provide employers with little assistance as they are confusing, costly, and time consuming.

Because similar issues and themes surface throughout the Department’s questions (listed above), our response focuses three areas: “Clarification and Authenticity” and

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“Recertification” provisions and the recourse available to employers when employees refuse or neglect to provide adequate (or any) leave certification.

**Discussion—“Clarification and Authenticity”**

According to § 825.307(a), employers with questions about a completed certification can contact the employee’s health care provider “for purposes of clarification and authenticity” provided that they: (1) use their own health care provider to contact the employee’s health care provider, and (2) have the employee’s permission. The Department has asked whether forcing the employer to engage its own health care provider results in “unnecessary expense.”

As the Department noted, employers feel that this provision has been “very costly” for them.\(^\text{20}\) Considering that all that can be gained through this mechanism is clarification (“can you explain what you meant by . . .?”) or authentication (“did you actually author this?”), the employer’s health care provider is often unnecessary.

When an employer seeks to authenticate or clarify information on a certification form, typically, it wants to know the expected length of the employee’s absence, whether the condition could recur, and whether the employee will be able to return to work promptly after the absence(s). None of these questions require medical expertise to understand the answer from the employee’s doctor. Certainly, no medical training is required to ask the employee’s health care provider if her signature on the form is genuine, nor is medical training required to clarify duration of the leave. Medical knowledge might be necessary if the employer wanted “clarification,” but employers usually do not care about or require information about the condition itself (e.g., details about the cancer).

For example, some employers have stopped asking employees for details about the medical condition on the health care provider form because this information is not required to administer leaves. Likewise, the State of California’s regulations regarding their state FMLA—The California Family Rights Act—allow employees to omit information about the “underlying diagnosis of the serious health condition.”\(^\text{21}\)

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\(^{20}\text{Request for Information, Supplementary Information, I(E).}\)

\(^{21}\text{CAL. GOV’T. CODE, § 12945.2(j)-(k); CAL. CODE REGS., tit. 2, §§ 7297.0(a)(1).}\)
Finally, the requirement that employers get permission from the employee before contacting an employee’s health care provider raises questions about the utility of the regulation altogether. If an employee has the ability to withhold permission, and does so, the employer is left with no recourse. Interestingly, within the past year, two federal appellate courts have held that an employee was not harmed and had no remedy where the employer contacted his or her health care provider without permission.22

Suggestions—Eliminate the Employer Health Care Provider Requirement and Reconsider Employee Approval for “Clarification and Authenticity”

Hewitt suggests that the Department revise § 825.307(a). The Department should allow employers to contact the employee’s health care provider directly. The employer’s engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request. Moreover, in cases when the employer simply wants clarification on the amount of time off required, it provides no true benefit to either the employer or employee.

Second, the requirement that employers receive the employee’s permission should be reconsidered. While it is important to protect the privacy of medical information, recent cases have essentially ignored this provision. Furthermore, given HIPAA concerns, it’s likely that the employee will still have a check over the process as the health care provider would require the employee’s permission before he or she would speak with the employer.

Discussion—Four Challenges With “Recertifications”

Recertifications are the only tool available to challenge active, approved leaves. Therefore, in attempting to battle employee abuse of intermittent leave this is perhaps the most important mechanism. For several reasons, however, the current method requires review.

- First, the section of the regulations addressing recertifications23 has caused more confusion for employers than any other regulatory provision. Specifically, many employers require employees to recertify their leaves “every 30 days.” Subsection (a), however, states that employers may require an employee to recertify every 30

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22 Moticka v. Weck Closure Systems, No. 05-1231, 2006 U.S. App. LEXIS 13443; 11 Wage & Hour Cas. 2d (BNA) 910 (4th Cir. May 31, 2006); Harrell v. United States Postal Serv., 445 F.3d 913 (7th Cir. 2006).

23 § 825.308
days and “in connection with an absence.” Even then, recertifications are only available for certain categories of serious health conditions (pregnancy, chronic or permanent/long term conditions). Furthermore, subsection (b) requires that where the health care provider has specified a minimum period of absence of more than 30 days, the employer must wait until that period has ended to request recertification. In practice, this means that where a leave of absence is certified for 90 days of treatment, the employer is unable to request recertification until the 91st day. At least three Ohio district courts have interpreted § 825.308 in this way. In practice, this adds a layer of significant complexity to leave administration. Employers must not only wait at least 30 days (or longer) before requesting recertification, but then may be required to wait an additional indefinite period until that employee takes FMLA leave due to his or her condition. It could be on day 91; it could be on day 231. Regardless, the employer must wait until the next day in order to request a recertification properly. Thus, even when employers follow § 825.308’s guidance, its variability creates extremely challenging administration just to meet a simple need.

Another provision of § 825.308 clarifies that where “there is a significant change in circumstances, or the employer receives information that would cast doubt on the continuing validity of the certification,” employers can request recertification at their own discretion. While this would seem to free employers from the difficulties caused by the “every 30 days and in connection with an absence” requirement, employers are reluctant to use this provision. Because this mechanism requires that employers subjectively select which employees will be required to recertify, many fear that no matter how carefully they apply the provision, they may be accused of illegal discrimination.

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25 It’s unclear whether § 825.308(b)(1)—which concerns “minimum durations” of “more than 30 days”—incorporates § 825.308(a)’s requirement that recertification can only be made “in connection with an absence” or whether it creates a separate standard for these durations of more than 30 days that excludes this requirement.
The most significant shortcoming of § 825.308 recertifications is the inability of employers to get a second opinion. Employees are under no obligation, nor are there any incentives, to have a second (different) health care provider recertify their need for continuing a leave. Unlike the initial certification where employers are allowed to request a second opinion using a health care provider of its own choosing (followed, where applicable, by a mutually-agreed upon third opinion), employees are not required to seek a different opinion for a recertification. As such, an employee can meet his responsibilities for recertifying by returning to the same doctor who will likely hold the same opinion. Although employers can ask more pointed or directed questions to flesh out or challenge the certification, the health care provider, who is often loyal to his or her patient, is under no obligation to answer them.

Suggestions—Four Changes To The “Recertifications” Provision
Hewitt proposes several changes to the regulations on recertifications. Because Congress included little detail within the law, the Department has broad flexibility to craft effective regulations. Our four suggested changes are as follows:

Permit Employers to Request Recertification Every 30 Days
- Simplify § 825.308 by deleting the requirement that employers can only request recertification “in connection with an absence” allowing employers to ask for a recertification every 30 days. This allows for manageable administration of the leave and creates clarity for employers (and the courts interpreting the provision). It is likely that this would only affect those on an active intermittent leave who have not needed to use their FMLA in over a month. The Department could allow such employees to “opt out” of these recertification requirements by checking a box on a standard form (see below) to indicate that he or she has not used any FMLA leave in the preceding 30 days. Because the regulations already allow the employer to require the employee to “report periodically on [his or her] status and intent to return to work,” it should not create an additional burden on employees.

Clarify That Employers May Use Their Discretion In Selectively Requesting Recertifications
- Emphasize that, in situations where “there is a significant change in circumstances, or the employer receives information that would cast doubt on the continuing

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26 § 825.308(e).

27 § 825.309(a).
validity of the certification,” employers can request recertification at their own discretion.

**Permit Employers to Request Recertifications by a Second (different) Health Care Provider**

- As mentioned above, recertifications are the only method for challenging the continuing need for an active leave, but are far less effective because they do not allow for the employer to get a different opinion. Given that the law allows second (and third) opinions for challenging the initial certification, the Department could revoke § 825.308(e) and apply that Congressional intent here for recertifications. Permitting employers to use second and third opinions in the recertification process would offer employers another option to use.

- The Department asked whether such changes would “create any hardships” for employers and employees. Employers could simply choose not to seek second and third opinions if they found them to be burdensome. For employees, because recertifications already require a visit to a health care provider regardless of whether it is the employee’s own doctor or a second opinion from a health care provider of the employer’s choosing, this likewise should not create any hardships. The only difference might be the use of a third doctor, where necessary, as is the practice with the original certifications. In short, employees might have to see an unfamiliar doctor (at most) twice instead of a familiar doctor once. While this might be more inconvenient, employers likely will use these recertifications infrequently. Taking the current second and third opinion process as a comparison, employers only use this approach in extraordinary circumstances.

**Create an Optional Recertifications Form**

- We suggest that the Department create a sample form for recertifications that provides a standard set of questions for the health care provider (e.g., “does the employee still require the same duration [X days] for the leave?”). The form could be much simpler than the WH-380 but could provide better guidance to employers. In addition, the form could include language to encourage the health care provider to give the detailed and accurate information that would assist employers in administering leaves. Fostering a more meaningful exchange of information will

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28 Request for Information, Section K.

29 The form could also instruct the employer to attach the initial certification to the recertification form, when it is for the employee’s own serious health condition, so that the health care provider could compare them.
help employers manage their workforce, eliminate the need for further inquiries (and the hassle that accompanies them), and create a more harmonious experience for both the employer and the employee. As is, employers who receive insufficient information are more likely to become suspicious which often leads to conflicts. The Seventh Circuit Court of Appeals recently held that an employer doesn’t need to prove or demonstrate that an employee is abusing the FMLA, but rather only an “honest suspicion” of wrongdoing. Providing this guidance to health care providers would help decrease such conflicts.

**Discussion—Employers Are Reluctant to Revoke the Designation of Uncertified Leaves**

Section 825.305(d) of the regulations states that “[a]t the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification.” In terms of “anticipated consequences,” § 825.311 explains that if an employee fails to provide “timely certification,” an employer “may delay the taking of FMLA leave . . . until the required certification is provided.” And, where the employee “never produces the certification, the leave is not FMLA leave.” While this all might seem simple enough, employers have not found this guidance to be reliable enough to act upon. Delaying a leave for the tardy return of a completed certification is meaningless because by the time the delayed certification has been returned, the employee has likely already taken leave (perhaps for weeks) and the employer can only revoke the FMLA designation for the time already taken. This situation is exacerbated because the employer cannot reduce any of the employee’s FMLA balance despite the fact that the employee was absent. As a result, the employee is rewarded by having the opportunity to take more than 12 weeks of leave in that given year. While the employer technically could terminate or discipline the employee for this non-FMLA time already taken, in all likelihood employers would be concerned that such an action would run afoul of the law’s sweeping prohibitions from interfering with, restraining or denying an employee’s leave.

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30 Crouch v. Whirlpool Corp., 447 F.3d 984 (7th Cir. 2006).
31 § 825.311(b).
The regulation’s guidance is even less helpful to employers when the documentation is never received. Although § 311(b) states that the leave is not FMLA leave when the employee “never produces the certification,” the operative word is “never.” How long must the employer wait until it can confidently assert that the employee will “never produce[] the certification?”

Employers know that if they request certification of a medical condition, they must allow the employee “at least 15 calendar days” after their request to submit a completed certification.34 If employers could reliably consider this 15th day (or even longer) a hard deadline for employees to return completed certifications, that certainty would provide a definitive rule.

However, in the next clause in § 305(b) employees are granted an undefined additional period to return the certification when “it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.”35 This forces employers to measure such subjective criteria as “diligent, good faith efforts” and “impracticable” circumstances. Many employers are reluctant to end the certification period at the 15th day because of the uncertainty in determining whether “extraordinary” circumstances are present.

In fact, most employers will err on the side of caution by extending the deadline past the 15th day. This trend is affirmed by the Hewitt 2004 Survey which showed that, on average, employers wait an average of 16 days before “consider[ing] discipline,” and the range extended to up to 60 days.36 Extending the deadline supports an employer’s determination that the employee’s circumstances were not “impracticable” enough to have failed to return the form, and that it properly took action against the employee for “never” having returned the form. But even if the

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33 Compare, e.g., Fuller v. Alliant Energy Corporate Servs., 456 F. Supp. 2d 1044 (N.D. Iowa 2006) (employee held to have “never” returned a certification after being absent for a month where the employer gave an additional week to produce the documentation and where the employee had already turned in fraudulent certification one week earlier) with Baldwin-Love v. Elec. Data Sys. Corp., 307 F. Supp. 2d 1222 (M.D. Ala. 2004) (finding the denial of the leave was proper where employer imposed a deadline of over 3 months since the start of the leave even where employee continued to send incomplete certifications) and Konipol v. Rest. Assoc., No. 01-7857, 2002 U.S. Dist. LEXIS 22439, 148 Lab. Cas. (CCH) P34,689 (S.D.N.Y. Nov. 20, 2002) (employer’s termination on January 7 for failure to return a completed certification for a continuous leave that started November 3 is inappropriate where employee made “diligent, good faith efforts” to provide “timely and adequate” certification).

34 § 825.305(b); LaFay v. Micron Tech. Inc., No. CV-05-287-S-BLW, 2006 U.S. Dist. LEXIS 85059, 12 Wage & Hour Cas. 2d (BNA) 148 (D. Idaho Nov. 21, 2006), Cook v. Electolux Home Products, Inc., No. 04-3063-MWB, 2005 U.S. Dist. LEXIS 29828, (N.D. Iowa Nov. 28, 2005) (both cases supporting the principle that once the employer requires certification, they must provide the employee with the full 15 days to return the completed forms).

35 § 825.305(b). See also LaFay, 2006 U.S. Dist. LEXIS at *7; Cook, 2005 U.S. Dist. LEXIS at *33.

employees have 30, 45 or 60 days, they would conceivably still be able to show their “diligent good faith efforts” to return the form at days 31, 46 or 61. Furthermore, courts have held that “employers cannot deny FMLA relief for failure to comply with their internal notice requirements.”

Most of the time, employees return the HCP form within 15 days. Nonetheless, some employees genuinely will not be able to return their forms in a timely fashion because of extraordinary circumstances (e.g., comas, cognitive health impairments and similar conditions). The regulations need to account for these situations, but even in those circumstances, the reality is that the conditions for the employee are extreme or extraordinary, not merely impracticable. Without better guidance, however, employers are generally unwilling to enforce the 15 day deadline, and are at least uncomfortable to revoke an FMLA leave designation, even after allowing for significantly more time. Employers could greatly benefit from further clarity around these rules.

**Suggestions—Create a More Definitive Standard Regarding the Revocation of Uncertified Leave Designations**

Although this is an issue that would benefit from clearer guidance, Hewitt recognizes the challenge in balancing employer and employee needs. The Department might consider creating a different standard for employees who “never” return their forms. Indeed, the Fifth Circuit Court of Appeals held that “equating a non-existent medical certification to an ‘incomplete’ one, would lead to results not contemplated by Congress when it enacted the FMLA . . . . [I]t would seem illogical to require an employer to continually notify an employee who failed to submit medical certification within a specified deadline.” The court continued that if employers were required to offer “a reasonable opportunity” to cure any deficiencies to employees who never returned any paperwork:

an employer could never set a real deadline for the return of a medical certification. In effect, whenever an employee failed to return a medical certification within the appropriate time period, the employer would be required to notify the employee of that fact and provide the employee with an opportunity to cure the deficiency

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38 Urban v. Dolgencorp of Texas, Inc. 393 F.3d 572, 577 (5th Cir. 2004).
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by allowing the employee to submit the certification within a new extended deadline—a scenario that could, in theory, repeat itself *ad infinitum*. The bottom line, therefore, would be that the concept of a ‘deadline’ under § 825.305(d) would have no meaningful significance and no actual consequences. This would, in effect, create an imbalance where [quoting from what it called the ‘stated purpose’ of the FMLA in 29 U.S.C. § 2601(b)(1)-(3).] the ‘legitimate interests of employers’ no longer receive the protections that Congress presumably intended to provide when it enacted the FMLA.³⁹

By creating a second standard, the Department would account for employees with *severe* serious health conditions (e.g., comas), but would otherwise allow employers to revoke the preliminary FMLA designation of uncertified leaves. The Department could revise § 825.305 to allow employers to decertify leaves where the employee fails to return any information unless the reason for the failure is due to extraordinary circumstances (a definition far more reflective of these severe conditions than “impracticable”). Adding a second standard would create a more bright-line rule that allows employers to manage their workforces more confidently. It would also encourage employees to submit completed certifications in a timely fashion or, at the very least, apprise their employers of their efforts within the 15 day timeframe.

**Interaction of the FMLA with Other Laws**

“FMLA’s interaction with other laws is also a potential source of confusion.”

Section I(D)

**Discussion - Applying Both the FMLA and State FMLAs Can Lead to Challenging and Illogical Results**

The Department mentioned that “interaction with other laws is also a potential source of confusion.” While the regulations mention the Americans with Disabilities Act (ADA) by name, an additional challenge has been the integration of the federal law with its state analogs. Currently, 23 states have leave laws that cover all or part of the reasons or conditions covered by the FMLA. Yet all of these state laws vary from the FMLA in either eligibility criteria (e.g., 1000 hours worked) or leave reason (e.g.,

³⁹ See *id.*
covering domestic partners or grandparents) or both, such that administration of the law can lead to challenging and illogical results.

Consider these three examples in California:

- **Example 1**: Employee A wants to take 12 weeks of leave for his domestic partner with a serious health condition and then 12 weeks of leave to care for a son with a serious health condition. He can do so. The first 12 weeks are covered by a California state law (the California Family Rights Act—CFRA) which, unlike the FMLA, applies to domestic partners. The second 12 weeks to care for the son is covered by the FMLA.

- **Example 2**: Employee B wants a similar leave except that he has an opposite-sex spouse. However, when Employee B takes the first 12 weeks to care for a spouse with a serious health condition instead of a domestic partner, both the FMLA and CFRA would run concurrently leaving no available job-protected leave to care for the son. As a result, Employee B’s employer can replace him were he to take a leave to care for his son.

- **Example 3**: Employee C, like Employee A, wants to take 12 weeks for a domestic partner with a serious health condition and 12 weeks to care for his son with a serious health condition, but in the reverse order as Employee A. That is, Employee A first takes 12 weeks to care for his son and then wants to take 12 weeks to care for his domestic partner. However, as with Employee B, both the FMLA and CFRA run concurrently during the first period leaving Employee C with no available time to care for his domestic partner.

This variability is manifest in all 23 of these states creating a crazyquilt of administrative challenges for employers and unfair results for employees. In the Hewitt 2004 Survey, employers were asked about their ability to comply with state leave laws. Of the 62 respondents that do business in 41 states or more, almost half of them indicated that they did not feel they “completely and consistently compl[ied]” with state leave laws. This demonstrates that many employers are struggling to comply with the varying rules and requirements.

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Suggestions—Allow Employers to Apply State Family and Medical Leave Provisions Where Applicable

The Department could allow employers, as exceptions to the basic eligibility and qualifying condition rules, to count time against the FMLA when analogous state laws apply. To use the examples above, in Example 1, Employee A’s employer would be able to run the FMLA to cover the employee’s domestic partner even though the law does not otherwise cover domestic partners. This would decrease the administrative burden for employers and create more uniformity and fairness in applying the FMLA and state laws. In short, Employee A would not receive an additional benefit denied to Employees B and C.

The regulations already make such exceptions in deference to state laws. While employers are allowed to select one of the four methods for calculating the 12-month period, the regulations also require that the one method be applied “consistently and uniformly to all employees.”

According to the regulations:

The exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine “any 12 months” for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

Hewitt suggests that the Department adopt this same approach to qualifying conditions, and if necessary propose a change in the law.

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41 § 825.110.
42 § 825.112.
43 § 825.200(d)(1).
44 § 825.200(d)(2).
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Thank you for offering the opportunity to provide this information about the FMLA. We hope that these and other suggestions lead to a revision and improvement of the current regulations, and would be glad to participate in any future discussions or forums about the regulations.

Sincerely,

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Sent via the internet at http://www.regulations.gov

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